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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 259

GEORGE D. POULOS,

Petitioner,

v.

THE STATE OF KANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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Petitioner prays that a writ of certiorari issue to review the judgments of the Supreme Court of the State of Kansas affirming his convictions in two separate cases under Kansas criminal statutes.

OPINION BELOW

The Supreme Court of the State of Kansas affirmed two judgments of conviction, both rendered in the Sedgwick District Court, one for second degree burglary and grand larceny, and the other for third degree arson and subornation of perjury. The petitioner was sentenced to im-

prisonment for a term of fifteen years for each count in the first case, the sentences to run concurrently; and to fifteen years for each count in the second case, the sentences to run concurrently. The trial courts issued no formal opinions, and their decisions are not reported. The opinions of the Supreme Court of the State of Kansas are reported at 196 Kan. 287, 41 P.2d 689 (1966), and 19 Kan. 253, 41 P.2d 694 (1966), respectively. The opinions are reprinted herein as Appendices A and B.

JURISDICTION

The judgment of the Supreme Court of the State of Kansas in each case was entered on March 5, 1966. Separate motions for rehearing and to continue bond were timely filed in each case and all denied on March 18, 1966. On May 28, 1966, Mr. Justice White extended the time for filing a petition for certiorari to and including June 20, 1966.

Petitioner seeks certiorari in this Court on the theory that his federal constitutional right to due process was violated. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

When the alleged crimes involved were felonies allegedly committed in Sedgwick County, Kansas, and when that county was saturated with word-of-mouth, radio, television and newspaper publicity against the accused over a period of years, whether it was proper, under the due process provisions of the Fourteenth Amendment to the United States Constitution, to deny petitioner's protective motion for change of venue in each case.[1]

[1] Other points were raised in the Kansas courts, relating principally to points of evidence, construction of the state statutes involved, and the requisite quantum of proof to establish petitioner's guilt in each case. Of course, in themselves, those contentions

STATUTES INVOLVED

"Every person who shall be convicted of breaking and entering in the nighttime — *First*, any building within the curtilage of a dwelling house, but not forming a part thereof; or, *second*, any shop, store, booth, tent, warehouse, or other building, or any boat or vessel, in which there shall be at the time some human being, or any goods, wares, or merchandise, or other valuable thing kept or deposited; or, third, any passenger coach, baggage, freight, or express car, caboose, or other railway carriage in this state, with the intent to steal or commit any felony therein, shall on conviction be adjudged guilty of burglary in the second degree: provided, that if the evidence produced at any trial of any person charged hereunder, shall in the opinion of the jury or judge, if tried to the court, be insufficient to prove that the alleged crime was committed in the nighttime, the jury or judge, if tried to the court, may find the defendant guilty of burglary in the third degree and if the jury or court shall so find, such defendant shall be punished as provided by section 21-523 of the General Statutes of 1949 or any amendment thereto."

Section 21-520 of
General Statutes of Kansas

"If any person in committing burglary shall also commit a larceny, he may be prosecuted for both offenses in the same court, or in separate counts of the same indictment; and on conviction of such burglary and larceny, shall be punished by confinement and hard labor, in addition to the punishment hereinbefore prescribed for the burglary, not exceeding five years."

Section 21-524 of
General Statutes of Kansas

"That any person who willfully sets fire to or burns

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do not present a federal question, and petitioner therefore does not feel free to raise them in this petition.

or causes to be burned, or who aids, counsels or procures the burning of any personal property of whatsoever class or category, such property being the property of another person, and of the value of twenty dollars or more, shall be guilty of arson in the third degree, and upon conviction shall be punished by confinement and hard labor for not less than one nor more than three years."

Section 21-583 of
General Statutes of Kansas

"Every person who shall be convicted of willful and corrupt perjury shall be punished in the following cases as follows: *First*, for perjury committed in the trial of any indictment for a capital offense, with an express, premediated design to effect the condemnation and execution of the person, death or confinement and hard labor not less than ten years; *second*, for perjury committed on the trial of an indictment for a capital offense, without such design, or for any other felony, by confinement and hard labor not less than seven years; *third*, for perjury committed on any other trial or proceeding, or in any other case, by confinement and hard labor for a term not exceeding seven years."

Section 21-702 of
General Statutes of Kansas

"Every person who shall procure any other person, by any means whatsoever, to commit any willful or corrupt perjury in any cause, matter or proceeding, in or concerning which such other person shall be legally sworn or affirmed, shall be adjudged guilty of subornation of perjury."

Section 21-703 of
General Statutes of Kansas

"Every person convicted of subornation of perjury shall be punished in the same manner as hereinbefore pre-

scribed, upon a conviction of the perjury which shall have been so procured."

Section 21-704 of
General Statutes of Kansas

STATEMENT[2]

It is unnecessary to the contentions herein to relate the complex facts presented in the trial of each case. In short, in the first case the petitioner was charged with second degree burglary in violation of Section 21-520 and grand larceny in violation of Section 21-524 of the 1961 Supplement to the 1949 General Statutes of Kansas. In the second case, the petitioner was charged with third degree arson in violation of Section 21-583 and subornation of perjury in violation of Sections 21-702, 703 and 704 of the 1949 General Statutes of Kansas.

Before trial in each case defense counsel made identical motions for a transfer of the trial from Sedgwick County, Kansas, to Wyandotte County, Kansas. The motions were argued simultaneously and denied.

The testimony of five citizens of the area supported the motions. (R. 6) Prominent newspaper, radio, and television reporters took oath that it was not probable that a jury could be selected which would not have a member or members who would not be prejudiced and biased against the petitioner. (R. 6, 7, 10) While the testimony showed intensive newspaper, radio and television publicity, it also demonstrated dramatically that word-of-mouth publicity was equally pervasive and prejudicial in the county. One witness testified that "there is an equal possibility or probability that Mr. Poulos, because of his reputation of unsavoriness, might not receive a fair trial." (RR. 34)

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[2] References herein as "R. __" are to the record in case designated No. 44,253 by the Clerk of the Kansas Supreme Court; and as "RR. __" to the record designated No. 44,147.

Defense counsel also called as a witness The Honorable Howard C. Kline, a judge of the Sedgwick District Court. Judge Kline had presided, on October 3, 1963, at a hearing on the defense motion for change of venue in a prior prosecution of the petitioner by the State of Kansas. After hearing testimony in support of the motion in such prior case, Judge Kline said in granting same:

> "This court knows of its own knowledge that many citizens of our community feel that this defendant should be in the penitentiary, whether he is guilty of this crime or any other crime; but knowing his reputation they feel that he should not be at liberty and should be confined in a penal institution. *This court knows this of its own knowledge.*" (Emphasis added.) (R. 108, 109)

In view of Judge Kline's statement from the bench in 1963, i.e., that he had personal knowledge of matters which bore on the probability of Poulos having a fair trial in Sedgwick County, the defense called him as a witness at the hearing involved herein. The trial court refused to permit Judge Kline to take the stand, even though he appeared voluntarily to testify. The trial court even emphasized that it made no difference whether Judge Kline was being called as a private citizen or a judge; or whether he were to testify on the evidence presented to him on the motion for change of venue in 1963, or to testify as to his personal knowledge of the prejudice and adverse publicity of the local populace against the petitioner. (R. 9, 10) Indeed, the court even refused to consider any evidence presented at the prior hearing on the same question of fact. (R. 7)

Thus the defendant's protective motion was denied, and the voir dire commenced. Of the twenty-three veniremen, fourteen admitted to knowledge concerning Poulos' past or about the case being tried. Even one veniremen, who admitted to being a close personal friend and fraternity brother of the police chief, was allowed to remain on the jury. (R. 13) Another veniremen admit-

ted to reading about the case which was on trial in the newspapers, but was not struck. (R. 57)

In many instances it took persistent questioning by defense counsel to ferret out evidence of prejudice and bias. One venireman who insisted he would be a fair and impartial juror, finally admitted on examination by the defense counsel that he had read in the newspaper about petitioner being involved in this matter. "Something about an airplane," is what that venireman stated in the presence of the entire panel of jurors. (R. 55)

Thus the specter of the adverse publicity about petitioner, and his repeated arrests by the police on various charges which were never substantiated or brought to trial, loomed large over the entire jury panel. Nonetheless, the court permitted eight of the persons who had admitted to knowledge of Poulos' past or of the case to be tried to remain on the jury. Having exhausted his peremptory challenges, the defense was powerless to prevent this, renewed his protective motion, which was again denied, and the case proceeded to trial.

After the trial, the jury in each case returned a verdict of guilty in each count. On March 5, 1966, the Supreme Court of the State of Kansas upheld the conviction.

STAGE AT WHICH FEDERAL QUESTION WAS PRESENTED

The federal question here presented necessarily first appeared with the rendition of the order of the trial court. Accordingly, the federal question was argued at the first available opportunity, namely, in the Brief of Appellant to the Supreme Court of the State of Kansas. That brief recites as its first point, "that such judgment and verdict violated his rights under the 14th amendment to the Constitution of the United States in that it denied him 'due process of law'." (Brief of Appellant to the Supreme Court of Kansas, No. 44,147, page 3.) (In case No. 44,-253, the Brief of Appellant stated on page 3 under "Argu-

ment and Authority" that "his constitutional rights were not protected, namely the right to a fair and impartial trial.")

The Supreme Court of the State of Kansas denied the petition, rejecting the constitutional argument in that court.

REASONS FOR GRANTING THE WRIT

The requirements of due process and fair hearing dictate the selection of an impartial jury. A court of appeals, on review, should do more than check the actual performance of the jury for overt evidence of impartiality. Rather, the court should decide whether the jury was so selected at the outset as to be most favorable to an impartial trial. *United States v. Florio,* 13 F.R.D. 296 (S.D. N.Y. 1952) correctly applied this standard in jury selection. There the court granted a change of venue because, although twelve impartial jurors might conceivably be found among the millions of persons in the Southern District of New York, the community prejudice was such that any jury would operate "under the shadow of doubt".

The widespread knowledge about the background and reputation of Poulos in Sedgwick County, Kansas, could be gleaned from the testimony of witnesses presented in support of the motion for a change of venue. The petitioner was described as "a common police character" and a man of bad reputation. (R. 10, 11, 36) The general reputation of the petitioner, established over a period of years in the county, was highly unsavory. The commission of most local crimes caused him to be arrested by the police for questioning, even though he had not been convicted of a felony for fifteen years prior to the trial. (R. 108) "[D]ue to his attitudes the press, radio and TV media have given these arrests a large amount of coverage, including front page articles in our local newspapers." (R. 108) Hence, petitioner's reputation was such that many persons felt that he belonged in jail. (R. 108)

The trial court disregarded all such testimony, even refused to permit defense counsel to call Judge Howard C, Kline to the stand, even though Judge Kline's opinion of October 1963 clearly showed that he had personal knowledge of facts which were material and essential to the motion before the court. The court's basis for such ruling was stated to be that it "is not going to permit any judge of this court or any division thereof or any other court to be asked his opinion of a matter on trial in another court, which is totally and wholly improper." (R. 9) Thus the petitioner was deprived of the opportunity of presenting a vital witness in support of his motion, and denied a fair hearing, which is one of the essential elements of due process.

The "shadow of doubt" over any jury selected from Sedgwick County deepened at voir dire. Fourteen out of the total twenty-three veniremen admitted to knowing about Poulos, or having read newspaper accounts of his arrests or other charges placed against him in the press, or heard or seen him under such circumstances on the radio or television, or read or heard about the case to be tried. The trial court did not excuse these jurors, perhaps because if knowledge of Poulos' background, arrests, and other charges were considered cause, no jury could have been selected. They were, instead, eliminated by defense challenges. The defense exhausted its challenges, however, and more than half of the jurors who finally served admitted to knowing of Poulos or of his background or of the case to be tried.

Factors militating against impartiality were apparent from the outset and became explicit at voir dire. The case was particularly exacerbating to the prejudices of Sedgwick County. The jury was drawn from people in the area where the alleged crime occurred, many of whom had been subjected over a period of years to intensive adverse publicity about the petitioner in the news media. With the petitioner being continuously subjected to arrests, which received considerable coverage in the

press, radio and television, most members of the public had been influenced into believing that petitioner "should be in the penitentiary". (R. 108) The trial court permitted the jury to be drawn from among the residents of Sedgwick County, wholly disregarding the extreme prejudice which occurs when jurors know the reputation of the accused and his many prior arrests, and can even compare the similarity in the circumstances of the alleged and wholly unproven involvements of the accused on prior occasions with the current charges. The trial itself was preceded by sustained, specific adverse publicity and local talk. Easy alternatives to trial under such circumstances were also obvious from the outset, but were consistently ignored. Petitioner thus did not have an impartial jury, and the Federal constitutional standard of due process were not met.

The circumstances of this case are similar to those in *United States v. Marshall*, 360 U.S. 310 (1959), in which the defendant was charged with unlawfully dispensing barbiturates. During the course of the trial, the jury learned through news accounts that Marshall had before been convicted of practicing medicine without a license. Each juror stated in a special voir dire, however, that he would not be prejudiced by the news accounts and the trial court took no further action. In a *per curiam* opinion this Court reversed because the jury was exposed to prejudicial information which was inadmissible in evidence.

Here, as in *Marshall*, adverse publicity resulted in exposing the jury to the normally inadmissible facts relating to the petitioner's other alleged involvements in local crimes and arrests on charges similar to the current ones. Hence, petitioner asks that the Court follow its course in *Marshall* and summarily reverse his conviction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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June 20, 1966

OPINIONS OF THE SUPREME COURT OF THE STATE OF KANSAS

I

In case No. 44,147, the opinion of the court was delivered by

FATZER, J.: The defendant, George D. Poulos, has appealed from a judgment rendered on a jury verdict finding him guilty of third degree arson in violation of K.S.A. 21-583 and subordination of Perjury in violation of K.S.A. 21-702, 21-703, and 21-704.

In seeking reversal, the defendant briefs and argues three points: First, that the district court erred and abused its discretion in not granting him a change of venue, and in not permitting Judge Howard C. Kline to testify on behalf of the defendant; second, that the district court erred in permitting Jack Flournoy to testify over the objection of the defendant, and third, that the district court erred in not granting the defendant a new trial.

Briefly summarized, the information filed in the district court charged that commencing prior to April 12, 1962, and continuously thereafter until April 24, 1963, the defendant Poulos, Rex Rudolph Conn, James H. Dolan and Eugene Reuben McCroskey unlawfully and feloniously conspired to commit the crime of arson in the third degree by willfully setting fire to and burning a Lockheed Lodestar airplane valued at approximately $13,500, by placing a small satchel containing an explosive charge and fuse beneath the under surface of the airplane, and causing this device to explode and set fire to and burn the airplane. The second count charged the defendants with a conspiracy over the same period to conceal the arson offense alleged in Count 1 by using force and threats of force to intimidate Paul R. Luttrell

to commit willful and corrupt perjury in a proceeding by which Luttrell falsely swore that Rex Rudolph Conn was in his presence at the time of the destruction of the airplane.

Subsequent to the filing of the information in the instant case, another information was filed in the district court charging the defendant Poulos and Rex Rudolph Conn jointly, with burglarizing the Town House Motor Hotel, Inc., in Wichita, in July, 1962, and with the larceny of four television sets therefrom. Subsequently, and on March 6, 1965, the defendant was convicted by a jury of those offenses and he has appealed, which is case No. 44,253, *State v. Poulos*, 196 Kan. , , this day decided.

On September 24, 1964, and prior to a trial on the charges contained in both informations, the defendant filed identical motions for change of venue in each case pursuant to K.S.A. 62-1318 and 62-1319. On October 2, 1964, both motions for change of venue came regularly on for hearing in division No. 5, before Judge James J. Noone and Judge James V. Riddel, Jr., sitting *in banc*. After hearing evidence offered by the defendant and considering counter affidavits offered by the state, the judges, acting concurrently, denied each motion.

The instant case proceeded to trial on October 26, 1964, and ended on November 5, 1964, with the jury finding the defendant guilty as charged in Counts 1 and 2 of the information. The defendant's motion for a new trial was heard on November 19, 1964, and overruled. On November 23, 1964, the defendant was sentenced as a habitual criminal under the Habitual Criminal Act (K.S.A. 21-107a) on each count for a term of not less than fifteen years, the sentences to run concurrently.

Turning to the questions argued on this appeal, the defendant contends the district court erred in refusing to grant his motion for a change of venue. His motion contained the same language as the motion in case No.

44,253, and alleged the defendant could not obtain a fair trial in Sedgwick County for two reasons: First, that the inhabitants of the county were prejudiced against him, and second, that because he had been given widespread publicity through newspapers circulating in the county and through radio and television broadcasts of a derogatory nature, an impartial and unprejudiced jury could not be had in Sedgwick County. Each motion moved the court for an order transferring the case to the district court of Wyandotte County.

In support of his motion, the defendant attached an affidavit of Roger N. Wilson, a newscaster for a Wichita radio station, identical in language as his affidavit attached to his motion in case No. 44,253, in which he stated he knew the defendant and because of publicity and rumor, the general reputation of the defendant reflected upon his character in a derogatory manner generally throughout the community, and, as a result of the defendant's reputation, it was not probable a jury could be selected to try the defendant upon the charges contained in the information, or in any other matter, which would not have a member or members who would not be prejudiced and biased against the defendant. Both motions were noticed for hearing on October 2, 1964, in division No. 5 of the district court of Sedgwick County.

At the hearing for change of venue, the defendant called as his first witness Mabel M. Snodgrass, the official court reporter for division No. 2, of the district court of Sedgwick County, who identified defendant's Exhibit "A" as being her uncertified, uncorrected office copy of a transcript of a hearing held October 3, 1963, before Judge Howard C. Kline in another criminal case involving the defendant, containing the sworn testimony of witnesses and Judge Kline's statement finding upon his "own knowledge" the defendant could not obtain a fair and impartial trial in Sedgwick County and granting a change of venue to the Saline County district court.

The defendant's second witness was Dale Dougherty, a reporter for the Wichita Eagle, and a resident of Sedgwick County for eighteen years. He testified that he reported the courthouse news; that he had seen stories in the local news media about the defendant; that within the last six months he had discussed the defendant's reputation with some persons and that his reputation and character were bad; that he did not know whether he agreed with the affidavit attached to defendant's motion and he was not sure what the result would be in impanelling a jury.

Dave Wilson was called as the defendant's third witness. He testified he had been a news director for nine years for a Wichita television station and had resided in Sedgwick County 23 years; that he had read and heard news regarding the defendant, but had never heard him discussed by other people; that in his opinion it was not probable to select a jury which would not have members who would not be prejudiced and biased against the defendant; that his opinion was based upon the fact that an adequate opportunity for forming an opinion had been given to the citizens of Sedgwick County due to the fact that modern communications were so great and widespread; that this was true in every case, not just in the case of the defendant, as he had been treated no different in the news than anyone else who makes headlines frequently; that his station had not made or produced inflammatory utterances or articles about the defendant and he had made no effort to treat him any different than anyone else charged with a crime.

Judge Howard C. Kline was called as the defendant's fourth witness for the purpose of placing in evidence the statement of his ruling on October 3, 1963, and to ask him if he had heard or read anything about the defendant since that time that would have changed his opinion. The court, *in banc*, took judicial notice of Judge Kline's ruling in the prior case, but not the evidence at that hearing, and excused him from testifying.

The defendant's fifth witness was Roger N. Wilson who signed the affidavit attached to the defendant's motion for change of venue. He testified he had been a resident of Wichita for five years and was acquainted with the defendant; that he had made newscasts regarding the defendant but he had been treated no different than any other person about whom he had occasion to report; that based on the general reputation of the defendant in the community, half of the community felt the defendant was a man of unsavory reputation and the other half was of the opinion the defendant had a reputation roughly comparable to a Robin Hood and a man who was persecuted; that there was equal possibility or probability the state of Kansas and the defendant might not get a fair trial; that his opinion was not based on any current facts or circumstances but was only his impression of what others had said and he had overheard, and that there could be a good number of people who might wish to see the defendant in prison whether he was guilty or not, but he was not sure this was the feeling of the entire community or even the majority.

Following the introduction of the testimony, counsel proferred defendant's Exhibit "A" to show Judge Kline's statement and the reasons for his ruling in 1963. The proffer was refused, and the defendant rested, offering no further testimony.

The state filed fourteen counter affidavits taken in a random selection largely from a list of jurors who had already completed their service. Although six of those affiants had heard of the defendant, none of them had formed or expressed an opinion about his guilt or innocence, or the merits of the case, which would require evidence to dispel, and further stated that if they were selected to sit as a juror, they would limit their consideration and deliberations to the evidence, the law, and the common knowledge they shared with all mankind.

At the conclusion of the hearing, Judge Noone and

Judge Riddel made a joint finding that they had not been convinced or shown there was any basis for change of venue; that they had no apprehension or fear the defendant would not receive a fair trial or that a jury of fair and impartial jurors could not be selected in Sedgwick County to try him, and, accordingly, denied the motion for change of venue.

The defendant concedes that in seeking a change of venue the burden rests upon him to show to the satisfaction of the district court that the inhabitants of Sedgwick County were so prejudiced against him, a fair and impartial trial could not be had, citing *State v. Hooper*, 140 Kan. 481, 37 P.2d 52, and further, that the district court must be allowed discretion in such matters, citing *State v. Knadler*, 40 Kan. 359, 19 Pac. 923. It is unnecessary to make an extended review of the many decisions of this court dealing with this subject. The law is clear, and recently this court restated its position in *State v. Turner*, 193 Kan. 189, 193, 194, 392 P.2d 863, that:

> 'It has been a long-standing rule in this state as stated by Justice Brewer in *State v. Furbeck*, 29 Kan. 532, that before a court is justified in sustaining an application for a change of venue on account of the prejudice of the inhabitants of the county, it must affirmatively appear from the showing that there is such a feeling and prejudice pervading the community as will be reasonably certain to prevent a fair and impartial trial. In *State v. Parmenter*, 70 Kan. 513, 79 Pac. 123, this court said it is not enough that prejudice against the defendant exists; but as the statute provides, it must exist to such an extent that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair trial cannot be had therein. In *State v. Bassnett*, 80 Kan. 392, 102 Pac. 461, it was said that G.S. 1949, 62-1321, requires that where proof is made by affidavits they must be to the satisfaction of the court. It is not enough that the petition state prejudice exists and a fair trial cannot be had; specific facts and circumstances show-

ing prejudice must be stated, and not conclusions. (*State v. Welch*, 121 Kan. 369, 247 Pac. 1053.) This subject has been thoroughly treated by this court in the case of *In re Hedrick Appeals*, 155 Kan. 165, 123 P.2d 806, wherein it was stated:

" 'The facts that the arrest of one charged with crime and the offense of which he is charged have received an extensive amount of publicity in many newspapers, local and metropolitan, which are distributed and read throughout the county or judicial district, and the matters generally discussed by the inhabitants and opinions freely expressed concerning the same, without more, are insufficient as a matter of law to sustain an order for the change of venue.' (Syl. ¶ 7.) See, also, *State v. Vernon King*, 190 Kan. 825, 833, 378 P.2d 147.

"The well-established rule is that before a change of venue to another county can be granted it must affirmatively appear that such prejudice exists as will be reasonably certain to prevent a fair trial. The ruling of the trial court upon this question will not be disturbed when supported by competent evidence, as it was here. (*State v. Miller*, 131 Kan. 36, 38, 289 Pac. 483; *State v. Hooper*, 140 Kan. 481, 495, 37 P.2d 52.)" (l. c. 193, 194.)

We take judicial notice that the population of Sedgwick County numbers approximately 300,000, out of which the defendant filed one affidavit, and only two other witnesses gave testimony whose opinions were based on defendant's general reputation. An analysis of their testimony reveals they testified to no facts or circumstances showing prejudice. Their testimony, set forth at length in the state's counter abstract, has been carefully studied and it shows the witnesses were dealing in theoretical possibilities, not facts or circumstances or personal knowledge. Moreover, there was no evidence which substantiated the defendant's allegation that publicity through newspapers, radio and television had brought about his prejudice because the publicity was so derogatory to him and prejudicial to his interests that a fair and impartial jury could not be had. Not one single newspaper article was attached to his motion or introduced in evidence,

and no other affirmative evidentiary examples of where or to what extent prejudice existed against the defendant were offered. In addition, the record clearly shows there was no difficulty in selecting a jury. The state waived its third and the balance of its peremptory challenges. The court asked the defendant for his peremptory challenge No. 3, and counsel stated, "If Your Honor please, I think we have a good jury," and waived his peremptory challenges. Both the state and the defendant passed the jury for cause. No contention is made there was any great public outcry or interest shown in the trial, or that the jurors were excited, upset, or prejudiced. The record does not show the court overruled any motion for a mistrial due to prejudicial conduct on the part of anyone. Nor does the defendant claim there was any misconduct on behalf of the jury, although one of the grounds of his motion for a new trial was that a member or members of the jury had been guilty of misconduct. That ground was abandoned by the defendant at the hearing of the motion for a new trial and it is not raised as a specification of error in this appeal. These are all important factors to be considered by this court in determining whether the district court abused its discretion in overruling a motion for change of venue. In *State v. Welch*, 121 Kan. 369, 247 Pac. 1053, it was said:

> "There is no immediate appeal from an order denying a change of venue. The order is reviewable only on appeal from conviction, and propriety of the order must finally be judged in the light of the proceeding resulting in conviction. A ruling may not be reversed merely to gratify a sentiment or to uphold a principle. The defendant must have suffered prejudice to his substantial rights. In this state, the readiness with which a qualified trial jury is obtained is pertinent to that subject. (*State v. Parmenter*, 70 Kan. 513, 515, 79 Pac. 123.) Defendant makes no complaint of difficulty in selecting a satisfactory jury. He does not suggest that, in examining jurors respecting their qualifications to sit, he found them to be in an excited state of mind, or so imbued with horror at what had been going on,

> or with detestation of crimes of violence, that wild conduct on their part was to be apprehended. He does not complain that any juror challenged for cause was permitted to remain on the jury. He does not show that he was obliged to exhaust his peremptory challenges. So far as the record discloses, no suspicion of prejudice against defendant entered the jury box when the jury was sworn, and there is no contention that an indignant populace invaded the precincts of the trial and communicated the contagion of its own mob passion to the panel. The statute provides that a new trial may be granted when a verdict is the result of passion and prejudice on the part of the jury. Refusal of the court to grant a new trial on that ground is not urged as error in his appeal. The result is, defendant's prediction that he could not have a fair trial failed, and the order of the district court denying the motion to change the venue of the trial is approved on two grounds: The application did not state facts sufficient to warrant the change, and the fact that a fair trial could be had in the county was demonstrated by the event." (l.c. 374.)

The defendant's failure to present affirmative evidence that prejudice existed so as to make it reasonably certain he could not obtain a fair trial, requires a conclusion that his evidence was totally and completely insufficient to permit the district court to order a change of venue. The facts concerning the trial itself, the lack of interest in the hearing for change of venue, the ease with which a jury was selected, the waiver by the defendant of three peremptory challenges, the statement of his counsel that it was a good jury, and the failure to allege any factors showing prejudice in the trial demonstrates to this court that the district court's ruling denying a change of venue was eminently correct.

The defendant argues the district court committed prejudical error in not permitting Judge Howard C. Kline to testify on his behalf. The record is clear and unequivocal that the real reason for calling Judge Kline was an attempt to substitute his judgment in the prior case for that of the judges hearing the instant case. The

court, *in banc*, stated it would take judicial notice of his order but that it would not take judicial notice of the evidence offered. Counsel stated he intended to call Judge Kline to inquire of him if he had heard any story or read anything in the newspaper since the hearing before him in October, 1963, that would have changed his opinion; to ask him if he was of the same opinion based upon those facts as he was a year ago, and to offer his statement into evidence. In support of his proffer of defendant's Exhibit "A," counsel stated:

> "Now in our case we have made an application as an individual standing charged with two crimes in two divisions that Your Honors sit in. *We have asked that a citizen, Honorable Judge Kline, be called here to testify, to set out his facts; the reasons why he made the decision he made.* And if the Court had allowed me—and this is in the form of a proffer—to introduce to Your Honors the transcript of the prior proceedings, Your Honors would have noticed that it was in a sense analogous to the situation in the Hendrick Case.
>
> *"Judge Kline said I don't care about the newscasters and all their testimony, I'm going to base this on facts that I know. In substance this is what he said*--it's not before you and this is in the form of a proffer—as an individual . . .
>
> "Possibly; our evidence here before this Court hasn't been factual enough, but I think that in a district where you have a District Court Judge who even though—when the defendant has applied for a change of venue, *and where his attorneys fail as a matter of law to prove a change of venue*, when he has peculiar knowledge himself, that one should be granted. If we have introduced one scintilla of evidence that a change of venue should be granted, coupled with what you know in your minds about this man, I think you've got to grant a change of venue, much the same as Judge Kline did, and I think that is the distinction between these two cases. And that is why we want—I didn't want to introduce Defendant's Exhibit A for—*I don't care so much about the testimony that the newscasters presented here.* I care . . . for those facts which

the judge set out in his findings of fact and conclusions of law, *which were not necessarily proven in each instance by our evidence in that hearing.*" (Emphasis supplied.)

In denying the defendant's proffer, the court stated:

"JUDGE NOONE: Two reasons; let the record show them both: First; because this Court is not going to permit any judge of this court or any other court to be questioned on the witness stand under oath as to whether or not he has changed his mind about a previous decision he made in another case. And, secondly, it's not going to permit any judge of this court or any division thereof or any other court to be asked his opinion of a matter on trial in another court, which is totally and wholly improper. And, finally, this matter, as we announced earlier this afternoon, is going to be tried on the issues in this affidavit, and on nothing else except the counter-affidavit, and for that reason, it is the joint ruling that the proffer is rejected and Judge Kline, you are excused."

We think the district court did not err in excusing Judge Kline as a witness and in rejecting the defendant's proffer. In the first place, as pointed out by the district court, the statute (K.S.A. 62-1321) provides that the truth of the allegations of a petition for change of venue shall be tried by affidavits of the petitioner and counter affidavits of the state. The requirement does not contemplate statements of a judge in deciding a prior and wholly unrelated case to the one then pending before the court. In the second place, with one exception, all of the witnesses who testified before Judge Kline were present and testified in the instant case. Obviously, the fact of calling him could not have been to testify to matters which transpired at the former hearing. The witnesses were present and the opportunity was afforded to ask them any questions they were previously asked. In fact, the record discloses the same general questions were asked and answered. In the third place, and without passing upon the validity of Judge Kline's previous order which is not before us, it would have been impossible for the state to

file counter affidavits in opposition to Judge Kline's state of mind, who made his decision based on facts within his own knowledge. (*State v. Taylor*, 137 Kan. 280, 20 P.2d 628.) The proof is to be made under the sanctity of an oath, not upon the opinion of unsworn persons who do not disclose the source of facts recited. As previously indicated, Judge Kline's conclusion was not based upon evidence presented before him, but was based upon his own knowledge.

After the district court denied the proffer, counsel inquired if the court's ruling would be the same if Judge Kline were called as any other citizen to testify, without referring to the previous case. The court stated:

> "If there is any reason why this man cannot get a fair trial in this court that exists today, there is nothing to stop you from putting on evidence as to what they are today, not what they were last October."

Counsel made no attempt to call Judge Kline as an individual citizen, but rested his case, offering no further testimony. At the hearing on the motion for a new trial, the defendant did not offer Judge Kline's testimony as an individual, nor is the refusal to permit him to testify as an individual included in the notice of appeal or in the specifications of error.

The state does not contend that a judge may not be called as a citizen to testify in a case. Opinion 15 of the Opinions of the American Bar Association, interpreting Canon No. 4 of the Canons of Judicial Ethics, as found on page 111 of the Ethics Handbook published by the Bar Association of the State of Kansas, states:

> "A judge may testify to the good character of a criminal defendant, after careful consideration of whether his testimony is necessary to a fair trial or simply a defense attempt to utilize the weight of his judicial position."

The proceeding in which the defendant attempted to

have Judge Kline testify was not a trial on the merits of a a case in which a judge would have to determine himself whether to testify on behalf of the defendant, but was a question of law to be decided by the district court. It is abundantly clear there was no refusal on the part of the district court to take judicial notice of the ruling in the prior case, and it did not err in refusing to receive extrinsic evidence to alter or explain that judgment approximately a year after it was rendered.

In its case in chief, the state presented the testimony of Jack Flournoy over the objection of the defendant because of incompetency of the witness due to his insanity during the period covered by his testimony. On April 3, 1962, Flournoy was adjudged insane by the probate court of Sedgwick County, which was just prior to the alleged conversations and incidents with the defendant. Thereafter, Flournoy was "restored" and no claim was made the witness was not competent at the time of trial. Following the defendant's objection, a hearing was had by the district court in chambers. The court held that since the defendant was not attacking the competency of the witness at the time he was testifying, but rather his incompetency at the time he perceived the events about which he was going to testify, the defendant's objection went to the credibility of the witness' testimony, which was a matter for the jury and not a question of admissibility to be decided by the court.

The defendant contends the district court had a duty under K.S.A. 60-408 to make inquiry concerning the extent of Flournoy's illness and determine the type of insanity he was adjudged to have had, and if it was the type which created a delusion, that is, "that he could be recalling a dream," which was capable of recollection and which might be false, he should not have been permitted to testify. We do not agree.

Prior to the adoption of the new Code of Civil Procedure, G.S. 1949, 60-2805, provided in part:

"The following persons shall be incompetent to testify:

"First. Persons who are of unsound mind at the time of their production for examination." (Emphasis supplied.)

Under that provision, this court held in *Sarbach v. Jones*, 20 Kan. 497, as follows:

"A person who has at some time, prior to the trial at which he is called upon to testify, been declared insane, and placed under guardianship, and thereafter, and before being introduced as a witness, has been duly adjudged sane and released from guardianship, is a competent witness in the case. Such witness, after his restoration to sanity, may testify respecting facts which occurred during the period he was under guardianship; and it is for the jury to judge of the credit that is to be given to his testimony." (Syl. ¶ 2.)

In the opinion it was said:

". . . A man may have many delusions, and yet be capable of narrating facts truly; and the existence of such delusions on his part, at the time of the occurrences which he is called upon to relate, goes to his credit, and not to his competency, when he is of sound mind at the time he is called upon to testify. . . ." (l.c. 500.)

See, also, *Holler v. Dickey Clay Mfg. Co.*, 157 Kan. 355, 139 P. 2d 846.

K.S.A. 60-407 provides in part:

"Except as otherwise provided by statute (a) every person is qualified to be a witness. . ."

This section is the keystone of the entire system of Rules of Evidence provided in Article 4 of the Code of Civil Procedure. It abolishes all pre-existing disqualifications and privileges of witnesses and wipes the slate

clean of all other exclusionary rules, leaving the one requirement for the admissibility of evidence, that of relevance. If the evidence is relevant to the issue being investigated, the jury is permitted to receive it, unless some other rule of exclusion or privilege, as announced in Article 4 or other statutes, causes the evidence to be excluded. (4 Vernon's Kansas Code of Civ. Proc., pp. 198, 199.) Under this section, a witness is presumed to be competent to testify. His incompetency, therefore, must be challenged and the burden of establishing incompetency rests on the challenger. (4 Vernon's Kansas Code of Civ. Proc., p. 269.)

Although the provisions of 60-407 are limited by the provisions of 60-417, the text is basically the same as the prior statute. (G.S. 1949, 69-2805.) Under 60-417 a person is disqualified to be a witness if the judge finds he is incapable of expressing himself concerning the matter so as to be understood by the judge and jury, or is incapable of understanding the moral duty of a witness to tell the truth. This section does not provide for disqualification on the basis of incapacity to observe or recollect. The witness' capacity to perceive or remember are for the fact finders—the jury—to consider in weighing the credibility of his testimony, but they are not bases of exclusion. (4 Vernon's Kansas Code of Civ. Proc., p. 269.)

The defendant makes no claim that Flournoy was incapable of expressing himself so as to be understood by the jury, nor does he claim that Flournoy was incapable of understanding the moral duty of a witness to tell the truth. Tested by the foregoing rules, Flournoy was not disqualified to testify. Whether he was insane and the type of insanity he may have had were matters which were determined by the probate court in 1962, and the district court was not concerned with those matters at the trial. It being conceded Flournoy was competent to testify as a witness at the time of trial, and not being disqualified under rules prescribed in 60-417, the defendant's reliance on 60-408

is misplaced as that section establishes a rule for trial procedure when the qualification to be a witness, or the admissibility of evidence, or the existence of a privilege, is subject to a condition and the fulfillment of the condition is in issue. No issue was presented under the record in this case with respect to Flournoy's competency to testify, and the district court did not err in overruling the defendant's objections.

The defendant lastly contends the district court erred in not granting him a new trial. This court has carefully examined the entire record, and the evidence against the defendant was overwhelming. Counsel has been diligent in raising alleged trial errors. Each has been carefully examined, but the defendant has failed to make it affirmatively appear the district court erred in any respect in overruling his motion for a new trial, or that he was not afforded a fair and impartial trial in Sedgwick County.

The judgment of the district court is affirmed.

II

In case No. 44,253, the opinion of the court was delivered by

FONTRON, J.: This is an appeal by the defendant, George Poulos, from a conviction of second-degree burglary and grand larceny.

Evidence introduced by the state tended to show that on the night of July 21, 1962, the defendant had a conversation with one Rex Conn at the Town House Motor Hotel in Wichita, Kansas, in which the defendant told Conn he would like to have some television sets from the Town House and that he had a master key to open the doors; Conn agreed to get the sets and Poulos gave him the master key; using the key given him by the defendant, Conn entered four hotel rooms, took a television set from each room, placed them in his car and drove east on Kellogg Street; the defendant pulled along side of Conn's car on Kellogg and Conn followed him

to a park where the defendant told him to wait; Poulos then drove off and returned a few minutes later with a man by the name of Russ Adams; Conn and the defendant unloaded three of the stolen television sets from Conn's car and placed them in Adams' car; Adams gave defendant the money for the three sets and the defendant handed Conn $75.00 as his share; Conn and defendant then loaded the fourth television set into the defendant's car and Conn left for home.

The specifications of error fall into four categories: First, that the trial court erred in overruling defendants' motion for change of venue, in connection with which it is claimed that the testimony of Judge Howard C. Kline was erroneously excluded; second, the court erred in permitting the state to endorse the name of George Taylor on the information and in admitting Taylor's testimony and instructing thereon; third, the court erred in giving an instruction on the unexplained possession of recently stolen property; and fourth, the court erred in overruling defendant's motion for a new trial. We shall consider these in order.

The grounds set out in the defendant's motion for a change of venue in this case were the same as those contained in a companion motion filed in a case then pending before Judge Noone, wherein Poulos, Conn and others were charged with arson and subornation of perjury. The two motions were consolidated for hearing and were presented jointly to Judge Noone and Judge Riddel, sitting *in banc*. The evidence introduced at the hearing, as well as the joint rulings of the judges on legal questions, pertained to the motions in both cases. At the conclusion of the joint hearing, both motions were overruled.

Poulos was first tried in Judge Noone's court, where a conviction was returned on November 5, 1964, several months before a verdict was obtained in this case. He appealed from that conviction, alleging, as he has in this case, that error was committed in the overruling of his

motion for a change of venue. That appeal is Case No. 44,147, *State v. Poulos*, 196 Kan._____, _____P.2d_____, this day decided.

It would be entirely repetitious to set out in this opinion what transpired at the combined hearing of defendant's twin motions for change of venue, or to detail the evidence introduced at that time. It would likewise be tedious, and a duplication as well, were we to repeat in this opinion the rules of law by which courts are governed in passing upon motions to transfer cases for trial. Justice Fatzer, in a comprehensive opinion rendered in *State v. Poulos*, supra, has ably depicted what occurred at the change of venue hearing and has thoroughly reviewed the applicable principles of law. We commend his discussion on those studious readers who are interested in the subject.

As this court pointed out in *State v. Welch*, 121 Kan. 369, 247 Pac. 1053, an order denying a change of venue will not be reversed unless it is shown to have prejudiced the substantial rights of a defendant. We have searched this record in vain for any affirmative evidence of prejudice resulting to Mr. Poulos from the denial of his motion.

It is apparent to us, from the record of the *voir dire* examination in this case, that no difficulty was experienced in obtaining a qualified jury. Poulos challenged no jurors for cause. Each member of the panel finally selected to hear this case was thoroughly examined and passed for cause by defense counsel. Those who had heard of the defendant were straightforward in asserting they knew nothing of *this* case, harbored no prejudice and would be fair and impartial in their judgments. The defendant even expended one of his peremptory challenges against a prospective juror who had never heard of him, rather than on one who had.

Our attention has been directed to no evidence of inflammatory press releases during the trial. Nor is there any claim that public wrath or indignation was rampant. Indeed, there is little indication that John Q. Public displayed

interest of any kind in the trial proceedings. It can hardly be contended that the jury was stampeded into hasty judgment by any show of public outrage when its deliberations consumed parts of two days.

We think nothing further need be said of the defendant's first claim of error. Applying the standards clearly defined in the first Poulos opinion, we hold that the trial court did not err in refusing a change of venue in this case or in Judge Kline's testimony.

We next consider alleged errors relating to the testimony of George Taylor. The defendant first maintains that it was error to permit the state to endorse Taylor's name on the information after the jury had been impanelled. The record shows the state's motion was made in the afternoon of March 2, 1964, at which time the prosecuting attorney, in the presence of defense counsel, advised the court he had a witness who had just been interviewed and outlined the substance of his expected testimony. After listening to arguments from attorneys on both sides, the court at 4:35 P.M., announced he would rule in the morning at 9:30, at which time the state's request was granted.

The defendant concedes that the endorsement of additional names on an information is a matter which is largely within the trial court's discretion (*State v. Thyer*, 143 Kan. 238, 53 P. 2d 907; *State v. Thomas*,, 173 Kan. 460, 249 P. 2d 645), but contends the trial court abused its discretion under the circumstances shown in this case. We cannot agree.

K.S.A. 62-802 provides in pertinent part that the prosecuting attorney shall endorse in the informations filed by him the names of witnesses known to him at the time of filing and, in addition, the names of other witnesses who afterward become known to him, at such times before trial as the court may prescribe. This statute is de-

signed to protect a defendant against being taken by surprise at the trial. (*State v. Eidson,* 143 Kan. 300, 54 P.2d 977; *Pyle v. Amrine,* 159 Kan. 458, 156 P.2d 509.)

A situation comparable to the one presented here was before this court in *State v. Thomas,* supra. In that case we held:

> "In a criminal action, whether the state may endorse on the information the names of additional witnesses at the beginning of the trial rests largely in the sound judicial discretion of the trial court. Examining the record before us we cannot say that discretion was abused." (Syl. ¶ 1.)

We have also held that endorsement of additional names on an information, even during a trial, rests within the sound judicial discretion of the trial court and where such endorsement has been permitte[illegible] material prejudice to the rights of the defendant must clearly be shown before it will constitute reversible error. (*State v. Hendrix,* 188 Kan. 558, 565, 363 P. 2d 522, and cases cited therein.)

In our opinion, no abuse of discretion has been shown. The statement that Taylor's testimony had not previously been known stands uncontradicted by the record. The request for endorsement came prior to the introduction of any testimony, and Taylor's name and address were made known to defense counsel at that time, as well as his expected testimony. Counsel had from 4:35 P.M. in the evening to 9:30 A.M. the next morning to interview Taylor had they wished to do so. There is no suggestion that counsel had been unable to confer with Taylor or that they desired additional time for that purpose. No request is shown to have been made by the defendant for a continuance at any step of the proceedings.

One of the chief complaints lodged against the endorsement of Taylor's name on the information appears to be that his testimony was thought to be inadmissible. We believe an objection of this character is irrelevant to the

endorsement itself. However, since the defendant did object to Taylor's testimony when it was later offered, we must determine whether it was properly admitted.

Taylor testified that while he was employed as a bellman at the Allis Hotel in October and November of 1964, the defendant, Poulos, approached him and offered him money for a passkey to the guest rooms. The state maintains that this evidence was admissible to show plan; system and method of operation on the defendant's part, even though the incident occurred more than two years after the Town House Motor Hotel was burglarized.

We are inclined to concur in the state's viewpoint. The defendant's co-conspirator, Conn, who had personally entered the Town House rooms and removed the television sets therefrom, testified that Poulos gave him a passkey for that purpose, although he did not say how Poulos had gained possession thereof. We believe there is sufficient similarity between the two incidents, the one at the Town House Motor Hotel, the other at the Allis Hotel, to make Taylor's evidence admissible as tending to show *modus operandi.*

This court has often held that evidence of independent similar offenses is admissible, under appropriate instruction as to the purpose for which it may be considered, where it tends to prove, among other things, intent, inclination, plan, scheme, method or system of operation. *State v. Handler,* 142 Kan. 455, 50 P. 2d 977; *State v. Myrick,* 181 Kan. 1056, 317 P. 2d 485; *State v. Shannon,* 194 Kan. 258, 398 P. 2d 344, cert. den. 382 U.S. 881, 15 L. Ed 2d 122, 86 S. Ct. 172, [rehearing denied November 15, 1965].) Conviction is not a prerequisite to the admission of such evidence; the commission of the similar offense is sufficient (*State v. Stephenson,* 191 Kan. 424, 381 P.2d 335). We have also held evidence of similar transactions admissible to show knowledge and method of doing business (*State v. Robinson,* 125 Kan. 365, 263 Pac. 1081). See also *State v. Harper,* 137 Kan. 695, 22 P. 2d 454.

In *State v. Wright,* 194 Kan. 271, 398 P. 2d 339, we discussed at some length the admissibility of evidence relating to similar offenses and said that our long recognized rule had not been changed materially by the enactment in 1963 of K.S.A. 60-455.

The defendant calls attention to the lapse of some two years between the two occurrences and argues that the second episode was so remote in point of time from the first as to be entirely irrelevant. We are obliged to differ. In *State v. Fannan,* 167 Kan. 723, 207 P. 2d 1176, we held:

> "Remoteness in time of such evidence, otherwise admissible, affects the weight and probative values and not the admissibility of the evidence." (Syl. ¶ 3.)

In *State v. Marshall,* 152 Kan. 607, 106 P. 2d 688, evidence that the defendant had given a bad check *two years after* the one on which he was being tried was held to be admissible. See also *State v. Ridgway,* 108 Kan. 734, 737, 197 Pac. 199; *State v. King,* 111 Kan. 140, 149, 206 Pac. 883; *State v. W. H. France,* 146 Kan. 651, 652, 72 P. 2d 1001; *State v. Grey,* 154 Kan. 422, 445, 119 P. 2d 468.

Since we hold that Taylor's evidence was admissible, there is no merit in the defendant's objection to the submission of Instruction 21, which limited the purposes for which his evidence could be used. It is not contended that the instruction incorrectly states the law and our reading of it suggests no flaw. A court is required to instruct upon the purposes for which evidence of similar offenses or civil wrongs may be considered. (*State v. Robinson,* supra; *State v. Mall,* 112 Kan. 63, 209 Pac. 820; *State v. Stephenson,* supra; *State v. Wright,* supra.)

It is next argued that the court erred in giving Instruction 13a, relating to the unexplained possession of recently stolen property. The defendant does not contend the instruction is incorrect, but maintains there was no evi-

dence to justify its being given. We believe the defendant is mistaken. Conn's testimony, as shown in the record, clearly places Poulos in joint possession and control of the stolen property with Conn, after it was taken from the Town House Motor Hotel. The instruction was properly given and the contention of the defendant on this point is not valid.

Finally, the defendant urges that his motion for a new trial should have been sustained. From a study of the record, we are satisfied there was ample evidence to support the judgment of conviction. Furthermore, no legal errors are shown to have prejudiced the substantial rights of the defendant. In our opinion, the trial court did not abuse its discretion in overruling the motion for new trial.

The judgment of the court below is affirmed.

Office-Supreme Court
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 259

GEORGE D. POULOS,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 259

GEORGE D. POULOS,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The petitioner seeks a Writ of Certiorari to the Supreme Court of Kansas to review the decisions of that Court affirming his convictions in the District Courts of Sedgwick County, Kansas, in two separate cases.

In the first case petitioner was convicted by a jury of Third Degree Arson and Subornation of Perjury and sentenced to fifteen years on each count. In the second case petitioner was convicted by a jury of Second Degree Burglary and Grand Larceny and sentenced to fifteen years on each count.

OPINIONS BELOW

The opinions of the Supreme Court of the State of Kansas are reported at 196 Kan. 253, 411 P.2d 694 (1966). And 196 Kan. 287, 411 P.2d 689 (1966), respectively. The opinions appear in the record beginning at R. 123 and RR. 119 respectively. The opinions with the exception of the "Syllabus by the Court" appear in the Petition as appendices A and B.

JURISDICTION

The petitioner seeks to have this Court accept jurisdiction under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

1. Should this Court review a judgment by the Kansas Supreme Court when defendant failed to present evidence of pre-trial publicity causing him prejudice?

2. Defendant failed to offer the testimony of Judge Howard C. Kline at the hearing on his Motion for New Trial and did not include the refusal to permit him to testify as an individual on his notice of appeal to the Kansas Supreme Court or in the specification of error. Should this Court review a question not properly presented to the Kansas Supreme Court?

3. When defendant takes the witness stand on his own behalf and as a part of his defense interjects his previous arrests and convictions into the trial as a tactic, can he appeal to this Court for review claiming that the jury was exposed improperly to his past criminal conduct?

STATUTES INVOLVED

62-1319. Same; removal to another district. Whenever it shall appear, in the manner hereinafter provided, that the inhabitants of the entire district are so prejudiced against the defendant that a fair trial cannot be had therein, the cause shall, by order of the court or judge, be removed to another district, in which such prejudice is not alleged to exist. *Kansas Statutes Annotated 62-1319.*

62-1321. Same; contents of petition; affidavits; notice; rebuttal. In the petition for a change of venue the applicant shall set forth the facts upon which the application is made, and the truth of the allegations in the petition shall be made to appear, by affidavits, to the satisfaction of the court. Notice of such application must be given to the county attorney, who may resist such application by counter affidavits. *Kansas Statutes Annotated 62-1321.*

STATEMENT OF FACTS

Petitioner, hereinafter referred to as defendant, was charged with Third Degree Arson and Subornation of Perjury in an Information filed in the Spring of 1964 for an offense committed in the Spring of 1962[1] (RR. 3-5). Defendant was later charged with Second Degree Burglary and Larceny in an Information filed in the Fall of 1964 for an offense committed in the Summer of 1962 (R. 4-5). The Arson-Perjury case was assigned to the Honorable James J. Noone, Judge of Division Five of the District Court (RR. 5). The Burglary-Larceny case was assigned to the

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1. References herein as "R. ____" are to the record in case designated No. 44,253 by the Clerk of the Kansas Supreme Court wherein the defendant was convicted of Second Degree Burglary and Larceny; and as "RR. ____" to the record designated No. 44,147, wherein the defendant was convicted of Third Degree Arson and Subornation of Perjury.

Honorable James V. Riddel, Jr., Judge of Division Four of the District Court (R. 5).

The two cases were handled separately with the exception of the hearing on the Motion for a Change of Venue which was filed in both cases in the Fall of 1964. Defendant in his motion alleged that the inhabitants of Sedgwick County were prejudiced against him and that he "had been given wide publicity through newspapers circulating in said County and through radio and television broadcasts originating in said County in a manner so derogatory to defendant and prejudicial to his interests, that a fair trial by an impartial and unprejudiced jury is not probable or cannot be had in said County." (R. 6) (RR. 5-6). An affidavit of Roger N. Wilson was attached to this motion. The affidavit stated:

"As a result of publicity and rumor, knows the general reputation of George D. Poulos does reflect upon his character in a derogatory manner generally throughout the community" and that "as a result of the reputation of George D. Poulos it is not probable that a jury could be selected in the above-captioned matter or in any other matter, which would not have a member or members who would not be prejudiced and biased against the said George D. Poulos." (R. 117-118) (RR. 116).

The motion was heard by Judges Riddel and Noone sitting en banc. Defendant called as his first witness Mable M. Snodgrass, the official Court Reporter for Judge Howard C. Kline of Division Two of the District Court. This witness identified defendant's Exhibit "A" as being her uncertified, uncorrected office copy of a transcript of a hearing one year earlier before Judge Kline in another case involving the defendant (R. 36) (RR. 31). Defendant's second witness was Dale Dougherty, a newspaper reporter

for the last nine years. At the time of his testimony he was covering the City Hall beat, but for two years prior to that he had covered the Court House news. He had seen stories in the local news media about the defendant. Within the last six months he had discussed the reputation of the defendant; that the character and reputation of the defendant was bad. The witness stated that he was not sure whether he agreed or disagreed with the affidavit filed with defendant's motion and that he was not sure what the result would be in impanelling a jury (R. 36-37) (RR. 31-32).

Dave Wilson who had been a News Director for nine years for a television station and a resident of Sedgwick County was defendant's third witness. He testified that he had known the defendant for twenty years. He had read and heard news reports concerning the defendant but had never heard him discussed. In his opinion it was not probable that a jury could be selected in which there would have a member or members who would not be prejudiced and biased against the defendant. The basis of his opinion was that an adequate opportunity for forming an opinion had been given to the citizens of Sedgwick County due to the fact that modern communications were so great and wide spread. This fact is true in every case, not just in the case of defendant as he had not been treated any differently in the news media than anyone else who had the headlines frequently. His television station had not made or produced any inflammatory utterances or articles about the defendant and had made no effort to treat him any differently than anyone else charged with a crime. His station can be seen in seventy percent of the State of Kansas (R. 37-39) (RR. 32-34).

Judge Howard C. Kline was called as a witness by the defendant for the purpose of placing in evidence his statement at the time of ruling in another case a year earlier, involving the defendant on the same issue before the Court and to ask him if he had heard or read anything since that time that would have changed his opinion. The Court took judicial notice of Judge Kline's ruling in the prior case and excused him from testifying (R. 8-9) (RR. 8-9).

Roger N. Wilson, the person who signed the Affidavit attached to defendant's Motion, was defendant's last witness. He testified that he had been a newscaster for a local radio station for five years and was acquainted with the defendant. On occasion since October 3, 1963, he had made newscasts in regard to the defendant but that he has been treated no differently than any other person about whom he has occasion to report. His opinion as to the general reputation of the defendant is divided. Based on his judgment of the feeling of the community, half of the community feels that the defendant is a man of unsavory reputation. The other half of the community's opinion is that the defendant has a reputation roughly comparable to a Robin Hood and a man who is persecuted. There is an equal possibility, or probability, that the State of Kansas might not receive a fair trial from some jurors because of the defendant's reputation as a man who has on occasion been persecuted as there is that the defendant might not get a fair trial. His opinion was not based on any concrete facts or circumstances, but only his impression of what others have said and he had overheard. He testified that there could possibly be some and possibly a good number of people who might wish to see the defendant in prison whether he was guilty or not, but the witness was not sure that this was the feeling of the entire community or even the majority of them. It is within the realm of proba-

bility that neither the State of Kansas nor the defendant would be granted a fair trial in Sedgwick County (R. 39-41) (RR. 34-36).

Following the introduction of the testimony by Mr. Wilson, counsel for the defendant proffered defendant's Exhibit "A" for the purpose of showing the Court the reasons for the ruling by the Honorable Judge Howard C. Kline. Counsel stated that Judge Kline's ruling in that case was analogous to the situation in the Hendrick case, 155 Kan. 165. Counsel stated that he did not care so much about the testimony of the witnesses he had presented at the hearing, but that he did care that Judge Howard C. Kline's findings of fact and conclusions of law which were not proven in each instance by the evidence of the defendant in the previous hearing should be placed before the Court (R. 41-42) (RR. 36-37).

The State then introduced its evidence which consisted of thirteen Counter Affidavits which were taken by A. J. Focht, a Deputy County Attorney, Sedgwick County, Kansas, who testified that he used primarily a jury list from a jury panel that had finished their service. In addition to that he picked at random other persons to which to submit a sample Counter Affidavit which gave them several choices. In addition to these thirteen Counter Affidavits, one additional Counter Affidavit was submitted which was taken by Martin Updegraff, a Deputy County Attorney (R. 44-46) (RR. 39-41).

Of the fourteen persons who were submitted Counter Affidavits, three people had knowledge of the defendant. In addition six other persons had heard of him. Each of the thirteen persons swore that he had not formed or expressed an opinion about the guilt or innocence of the defendant or the merits of the case which would require evi-

dence to dispel, and further each of them swore that if he were selected to sit as a juror he would limit their consideration and deliberation to the law, the evidence and the common knowledge he shared with all mankind (R. 46-53) (RR. 41-48).

The State then rested and the Judges both ruled that they had not been convinced or shown that there was any basis for a change of venue and that they personally had no apprehension or fear that the defendant would not receive a fair trial or that a jury of fair and impartial jurors could not be selected to try him. The application was overruled and both cases set for trial (R. 46) (RR. 41).

The Arson-Perjury case came on for trial some three weeks later with the defendant represented by the former County Attorney and a former Chief Deputy County Attorney (RR. 12). A jury was selected with no difficulty. No juror was challenged for cause and following the voir dire examination both the State and defendant waived their last three peremptory challenges. At that time the defendant's chief trial counsel states: "If your honor please, I think we have a good jury." (RR. 48).

The State's evidence was then produced which showed that on April 12, 1963, a Lockheed Lodstar Airplane which had been purchased for $13,500.00 and insured for $100,000.00 was parked at the Airport by the pilot for the owner (RR. 78). A large explosion was heard and felt as far as a mile away and the plane immediately caught fire and began to burn (RR. 49-52).

Men from the airport and the fire department arrived and battled the blaze to no avail (RR. 55). The gasoline tanks ruptured and the plane was destroyed by fire (RR. 53). The scene was immediately protected by law enforcement agencies and an investigation commenced (RR.

55). Physical evidence was obtained at the scene consisting mainly of various parts of the airplane found in areas varying up to several hundred yards from the airplane (RR. 51-56). These parts were secured by the Wichita Police Department and subjected to chemical and physical examination by expert witnesses. These witnesses testified that the airplane had been destroyed in a high level dynamite explosion which caused the fire. This was supported by chemical analysis of the residues taken from the destroyed airplane which were compared with controlled experiments performed by the witnesses with dynamite and gasoline (RR. 69-74).

A co-defendant, Rex Conn, was called as a witness who testified that he and two other co-defendants, James Dolan and Eugene McCroskey, were hired by the defendant to destroy the airplane (RR. 64). The witness said that he and the other two co-defendants had obtained a satchel of dynamite from the defendant (RR. 64). They drove to the airport and set the dynamite off under the airplane (RR. 65). The ownership of the automobile by Eugene McCroskey was substantiated by a member of the Intelligence Unit of the Kansas City, Missouri Police Department (RR. 69).

A few days later all the co-defendants (who later pled guilty and are incarcerated) met with the defendant on the Kansas Turnpike where an argument ensued over money (RR. 65). An official of the Kansas Turnpike substantiated the date of the meeting by records showing entrance and exits (RR. 66-67). A reluctant witness, produced under the provisions of the Uniform Production of Witnesses Act, admitted that he had discussed with the defendant the matter of blowing up an airplane but had refused to participate because of fear of getting into

trouble with the Federal Authorities. The witness was told by defendant later that someone else had gotten the money he could have had (RR. 58-64). This witness admitted he was afraid to testify against the defendant. Another witness who had discussed destruction of the airplane with the defendant before it was destroyed testified that he gave a watered-down deposition in a civil case pending in the United States District Court over damage to the airplane. This was done to insure that his business and health would not be endangered (RR. 55-58).

Another witness, Paul Luttrell, admitted giving a false deposition in the same case due to fear for the safety of his children (RR. 67-69). The witness had overheard a conversation in which the defendant told one of the co-defendants that if he needed money why didn't he go out and blow up an airplane. This conversation occurred prior to the destruction of the plane (RR. 67).

The defense to the arson was that the plane was destroyed in a gasoline explosion followed by a fire rather than a dynamite explosion. An architect and an engineer testified as expert witnesses. They were of the opinion that the damage was not consistent with a high level explosion. They had run tests and experiments to substantiate their opinions (RR. 80-82). Neither witness had taken into consideration any chemical analysis in arriving at their opinion nor had they physically inspected the airplane. One of them had examined physically one small piece of aluminum (RR. 80-82).

The President of the Corporation that owned the airplane testified that he had never talked to the defendant and that the assets of the corporation were considerable (RR. 78-79).

In defense of the perjury count the defendant's wife and his friend testified that the two witnesses for the State had said they were lying for the Wichita Police Department (RR. 74-75).

In rebuttal the State produced further chemical tests performed after the trial was started to substantiate that dynamite and not gasoline had caused the explosion (RR. 83).

A witness testified that on the morning following the fire he had seen the President of the Corporation that owned the airplane engaged in conversation with the defendant in a snack bar (RR. 83). The Certified Public Accountant for the Corporation stated the company had suffered large losses in that year (RR. 83).

The jury found the defendant guilty (RR. 16). Defendant filed his Motion for a New Trial which was argued and overruled (RR. 85-94). The next day counsel for defendant was allowed to reopen his argument to allege for the first time that his rights under the Fifth Amendment and Fourteenth Amendment, Section One to the United States Constitution were violated (RR. 94-96).

The defendant was then sentenced as a habitual criminal to fifteen years on each count. He appealed the verdict to the Kansas Supreme Court. No contention was made that there was any public outcry or interest shown in the trial, or that the jurors were excited, upset or prejudiced. The Court did not overrule any motion for a mistrial on the part of anyone. The defendant abandoned his formal ground of jury misconduct at the hearing on the Motion for New Trial (Petition, App. 8).

The Kansas Supreme Court affirmed the judgment of the trial court finding that there was no evidence to substantiate "the defendant's allegation that publicity

through newspapers, radio and television had brought about his prejudice because the publicity was so derogatory to him and prejudicial to his interests that a fair and impartial jury could not be had. Not one single newspaper article was attached to his motion or introduced in evidence, and no other affirmative evidentiary examples of where or to what extent prejudice existed against the defendant were offered." (Petition, App. 7-8).

The Burglary - Larceny case came on for trial on December 14, 1964 (R. 11). The defendant moved to continue the matter to the January term of Court, which was denied, and orally moved for a change of venue, which was denied (R. 11). The jury was selected and the evidence presented (R. 11). The jury deliberated for two days and announced that they were deadlocked and could not agree (R. 12). The Court declared a mistrial for that reason and ordered the defendant to return for trial at a future date (R. 12). The defendant's Motion to continue the matter to the January term of Court was granted over the State's objection (R. 12). The case was set for January 18, 1965, the opening day of the January term (R. 12).

On February 1, 1965, the defendant went to trial in the United States District Court for the District of Kansas on an indictment returned against him August 22, 1963 (R. 114). No Motion for a change of venue, Motion for transfer of division because of prejudice of the inhabitants, or for a counter-designation of trial was filed (R. 121). On February 5, 1965, the defendant was convicted in the United States District Court (R. 117).

Approximately one month later the defendant went to trial on the Burglary-Larceny case (R. 118). No difficulty was had in selecting a jury and the defendant

challenged no juror for cause (R. 53-61). One juror was excused because of personal business reasons over the objection of the defendant (R. 54). Defendant exercised all of his peremptory challenges during the course of which he excused one juror who testified on voir dire examination that he had never heard of the defendant and did not know him (R. 56-57). The defendant also excused another juror who was not even asked whether he had heard of the defendant (R. 60-61).

The State's evidence showed that in July of 1962, the defendant had a conversation with one Rex Conn at the Town House Motor Hotel in Wichita, Kansas, in which the defendant told Conn he would like to have some television sets from the Town House and that he had a master key to open the doors (R. 16); Conn agreed to get the sets and defendant gave him the master key (R. 16); using the key given him by the defendant, Conn entered four hotel rooms, took a television set from each room, placed them in his car and drove east on Kellogg Street (R. 16); the defendant pulled alongside of Conn's car on Kellogg and Conn followed him to a park where the defendant told him to wait (R. 16); the defendant then drove off and returned a few minutes later with a man by the name of Russ Adams (R. 16); Conn and the defendant unloaded three of the stolen television sets from the car and placed them in Adams' car; Adams gave the defendant the money for the three sets and the defendant handed Conn $75.00 as his share (R. 16); Conn and the defendant then loaded the fourth set into the defendant's car and Conn left for home (R. 16).

A bellman at the Allis Hotel in Wichita, Kansas, testified that the defendant had, subsequent to the date of the charged offense, approached him and offered him

money for a pass key to the guest rooms (R. 18). The defense was alibi and persecution. The defendant took the stand and on direct examination by his own attorney went through his complete criminal record for the first time before the jury (R. 21-22). He also told the jury that he had been arrested by the Wichita Police Department some 100 times (R. 21). The jury found the defendant guilty of Second Degree Burglary and Larceny and following a Motion for a New Trial being filed and argued the defendant was sentenced to fifteen years on each count as a habitual criminal (R. 119-121).

The case was then appealed to the Kansas Supreme Court who affirmed the judgment pointing out that no difficulty had been experienced in obtaining a qualified jury (R. 124). The defendant challenged no juror for cause (R. 124). Each member of the jury panel finally selected to hear the cause was thoroughly examined and passed for cause by defense counsel for the defendant. The defendant had expended one of his peremptory challenges against a prospective juror who had never heard of him rather than on one who had (R. 124).

No evidence of any inflammatory press releases during the trial was brought to the attention of any Court (R. 124). Nor was there any claim that public wrath or indignation was rampant (R. 125). The public displayed no interest of any kind in the trial proceedings (R. 125). There was no showing the jury was stampeded into hasty judgment by any show of public outrage (R. 125). The deliberations of the jury constituted part of two days (R. 125).

REASONS CERTIORARI SHOULD BE DENIED

1. Defendant Failed to Present Any Evidence of Publicity Causing Prejudice to Him.

Defendant alleges a "shadow of doubt" hung over any jury selected to try the defendant from Sedgwick County (Pet. p. 9). He relies on *United States* v. *Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952). A review of *Florio* indicates this was a hearing on a motion for a change of venue. The trial court was detailing his reasons for changing venue. The court reviewed the evidence that was presented to him in connection with the motion. In *Florio* the court points out that on the very morning of the selection of a jury to try the defendant, newspaper articles appeared in various newspapers describing the defendant as a "mobster" and leader of a notorious organization known as the "Ed Florio Gang" (p. 296). There were frequent references to defendant's past criminal record and accusations of crimes not connected with the crime he was indicted and to be tried for. The Court stated:

> "This publicity was not of the usual sort which accompanies an important trial of public interest." (p. 298).

How different the *Florio* case from this case! Defendant conceded below that:

> "In seeking a change of venue the burden rests upon him to show to the satisfaction of the District Court that the inhabitants of Sedgwick County were so prejudiced against him a fair and impartial trial could not be had, citing State v. Hooper, 140 Kan. 481, 37 P.2d 52, and further that the District Court must be allowed discretion in such matters, citing State v. Knadler, 40 Kan. 359, 19 Pac. 923." *State* v. *Poulos*, 196 Kan. 253, 257, 411 P.2d 694.

The applicable Kansas Statutes providing for a change of venue in criminal cases are set out in statutes involved. K.S.A. 62-1319 is not unlike Rule 21 of the Rules of Criminal Procedure applicable to the Federal Courts. The law in Kansas on the subject is clear and was stated by the Kansas Supreme Court in *State* v. *Turner*, 193 Kan. 189, 392 P.2d 863.

> " 'It has been a long-standing rule in this state, as stated by Justice Brewer in State v. Furbeck, 29 Kan. 532, that before a court is justified in sustaining an application for a change of venue on account of the prejudice of the inhabitants of the county, it must affirmatively appear from the showing that there is such a feeling and prejudice pervading the community as will be reasonably certain to prevent a fair and impartial trial. In State v. Parmenter, 70 Kan. 513, 79 Pac. 123, this court said it is not enough that prejudice against the defendant exists; but as the statute provides, it must exist to such an extent that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair trial cannot be had therein. In State v. Bassnett, 80 Kan. 392, 102 Pac. 461, it was said that G.S. 1949, 62-1321, requires that where proof is made by affidavits they must be to the satisfaction of the court. It is not enough that the petition state prejudice exists and a fair trial cannot be had; specific facts and circumstances showing prejudice must be stated, and not conclusions (State v. Welch, 121 Kan. 369, 247 Pac. 1053). This subject has been thoroughly treated by this court in the case of In re Hedrick Appeals, 155 Kan. 165, 123 P.2d 806, wherein it was stated:
>
> " 'The facts that the arrest of one charged with crime and the offense of which he is charged have received an extensive amount of publicity in many newspapers, local and metropolitan, which are distributed and read throughout the county or judicial district, and the

matters generally discussed by the inhabitants and opinions freely expressed concerning the same, without more, are insufficient as a matter of law to sustain an order for the change of venue.' (Syl. ¶7). See, also, State v. Vernon King, 190 Kan. 825, 833, 378 P.2d 147.

" 'The well-established rule is that before a change of venue to another county can be granted it must affirmatively appear that such prejudice exists as will be reasonably certain to prevent a fair trial. The ruling of the trial court upon this question will not be disturbed when supported by competent evidence, as it was here. (State v. Miller, 131 Kan. 36, 38, 289 Pac. 483; State v. Hooper, 140 Kan. 481, 495, 37 P.2d 52).' "

The Kansas Statutes providing for an application for a change of venue contemplate that the trial will be on the issues framed by the affidavit filed in accordance with K.S.A. 62-1321. The test to be aplied by the Court is set out in K.S.A. 62-1319. Specific facts and circumstances showing prejudice must be stated in the evidence and the affidavit and not conclusions. *State* v. *Welch*, 121 Kan. 369, 247 Pac. 1053.

Following denial of a change of venue the trial court's decision may be reviewed by the Kansas Supreme Court. An abuse of discretion by the trial court in denying the change of venue must be conclusively established by the record. *State* v. *Waldron*, 118 Kan. 641, 236 Pac. 855.

Factors the court considers in determining whether the trial court abused its discretion in overruling a motion for change of venue are set out in *State* v. *Poulos*, 196 Kan. 253, 41 P.2d 694. They include a study of the testimony of witnesses presented as to any facts or circumstances showing prejudice. Here defendant filed one affidavit. (R. 117). The State countered with fourteen af-

fidavits (R. 46-53). The defendant called the affiant and two other witnesses to testify as to pretrial publicity. The affiant testified he has been a resident of Wichita for five years and was acquainted with the defendant; that he had made newscasts regarding the defendant, but he had been treated no differently than any other person about whom he had occasion to report; that based on the general reputation of the defendant in the community, half of the community felt the defendant was a man of unsavory reputation and the other half was of the opinion the defendant had a reputation roughly comparable to a Robin Hood and a man who was persecuted; that there was equal possibility or probability the State of Kansas and the defendant might not get a fair trial; that his opinion was not based on any current facts or circumstances, but was only his impression of what others had said and he had overheard, and that there could be a good number of people who might wish to see the defendant in prison whether he was guilty or not, but he was not sure this was the feeling of the entire community or even the majority (R. 39-40).

An analysis of the testimony presented by defendant reveals the witnesses testified to no facts or circumstances showing prejudice. The Kansas Supreme Court found:

> "There was no evidence which substantiated the defendant's allegation that publicity through newspapers, radio and television had brought about his prejudice because the publicity was so derogatory to him and prejudicial to his interests that a fair and impartial jury could not be had. Not one single newspaper article was attached to his motion or introduced in evidence, and no other affirmative evidentiary examples of where or to what extent prejudice existed against the defendant were offered." *State* v. *Poulos*, 196 Kan. 253, 258, 411 P.2d 694 (Pet. App. 7-8).

This Court has determined that in general the burden of establishing prejudice on the part of a juror when there is a claim of violation of due process is upon he who claims it. *Irvin* v. *Dowd*, 366 U.S. 717.

Certain well reasoned exceptions to this rule have been laid down. When a State substitutes trial by ordeal through television coverage of the confession of a defendant and it is seen by a substantial number in the community, it will be presumed that prejudice exists. *Rideau* v. *Louisiana*, 373 U.S. 723.

When there is massive pretrial publicity coupled with television of the court proceedings over defendant's objection in such a way as to make a fair solemn judicial determination of defendant's guilt or innocence impossible, it will be presumed that the defendant suffered thereby. *Estes* v. *Texas*, 381 U.S. 532.

A cause celebre with intrusion by the press into the very trial itself coupled with action of state officials in adding to the publicity and failing to take corrective steps to protect the defendant cause a totality of circumstances which warrant the conclusion that the trial was inherently lacking in due process. *Sheppard* v. *Maxwell*, 384 U.S. 333.

The instant case meets and passes with flying colors all tests laid down by this Court. An independent review of the record will reveal that this was no cause celebre as in *Sheppard*. Indeed the court below notes that no contention was made that there was any public outcry or interest in the trial. There was no inflammatory news articles, or any claims of such. There was no disclosure to news media by police or prosecutor of evidence which would be admitted in the trial. No statements were shown to have been given by the police or the prosecution to the news media.

No one attended the motions on the change of venue save those on business with the court and one person who worked in the courthouse. The only newsmen present were those summoned by the defendant (R. 43).

The first trial commenced more than two years after the crime. Following the conviction defendant was tried in the same city in the United States District Court. He failed to move for a transfer of trial under Rule 21 of the Federal Rules of Criminal Procedure, which is strong evidence that he did not believe his own allegation that a fair jury could not be had in Sedgwick County, Kansas (R. 121). No misconduct of police, prosecutor, prosecution or jurors was claimed by anyone.

In the final analysis the most important question is whether the defendant was tried to an impartial jury. In the Arson-Perjury case no juror was challenged for cause. The defendant waived half of his peremptory challenges (RR. 48), stating:

> "If Your Honor please, I think we have a good jury." (RR. 48).

No contention is made that the jurors were excited, upset or prejudiced (Pet. App. 8). The record does not show the court overruled any motion for a mistrial due to prejudicial conduct on the part of anyone. Following a hung jury on the first trial of the Burglary-Larceny case, the jury that convicted the defendant was selected. Only one man was excused by the court for personal reasons. No one was challenged for cause by the defendant. The only person excused had heard of the defendant and yet the defendant objected to his being excused (R. 54). No jurors were excused for cause by either side (R. 124). Defendant even expended one of his peremptory challenges against a person who had never heard of him rather than

against one who had (R. 124). No claim was made that the public wrath or indignation was rampant. The lower court found:

> "Indeed, there is little indication that John Q. Public displayed interest of any kind in the trial proceedings. It can hardly be contended that the jury was stampeded into hasty judgment by any show of public outrage when the deliberations consumed part of two days." (R. 125). *State* v. *Poulos*, 196 Kan. 287, 290, 411 P.2d 689.

Defendant in his petition fails to point out to this Court that he was convicted by two separate juries. He also fails to mention that he was convicted by a jury in the Federal Court of which he made no complaint. Yet this jury sat in the same city and was drawn from the same area that was served by the news media that he complains of. Perhaps recognizing the total lack of evidence which he presented to the trial court in behalf of his Motion for a change of venue, defendant has in his petition cited as authority for his evidence defendant's Exhibit A, which was offered by him but was refused by the trial court for the reason that it was the trial judge's opinion in a previous case decided over a year earlier (R. 108). Defendant failed to present a single newspaper article to the court for consideration and conceded his evidence fell short of that required by the applicable Kansas law (R. 42). Defendant should not now complain of his conviction for as the Kansas Supreme Court found the evidence was ample against him. It was not a prejudiced jury that convicted the defendant, but a good group of citizens doing their sworn duty under the law to "well and truly try the case according to the law and the evidence."

The fact that petitioner did not challenge for cause any of the jurors selected is strong evidence he was convinced the jurors were not biased and had not formed any opin-

ions as to his guilt. *Beck* v. *Washington*, 369 U.S. 541. Defendant has failed completely at any stage of this proceeding to present any evidence which would have allowed a court to properly change venue. It is as this Court stated in *Beck* v. *Washington*, 369 U.S. 541:

> "While this court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'" (p. 558).

2. Defendant Failed to Properly Preserve the Question of Exclusion of Judge Kline's Testimony and This Court Should Refuse to Review the Decision of the Kansas Supreme Court on the Question.

Defendant did not proffer Judge Kline's testimony at the hearing on the Motion for New Trial. He proffered an uncertified, uncorrected shorthand copy of a hearing in front of Judge Kline in October of 1963, a year before the hearing in the instant case (R. 91) (RR. 88).

The record is not clear that defendant did in the Burglary-Larceny case even proffer defendant's Exhibit A (R. 90-93) (Defendant's Exhibit A) (R. 95-111). This is not what the Kansas Law contemplates. It requires that where error is claimed in the exclusion of evidence that evidence must be produced at the hearing on a Motion for New Trial by affidavit, deposition or oral testimony. Kansas Statutes Annotated 60-259; *State* v. *Wellman*, 102 Kan. 503, 170 Pac. 1052. Failure to comply with this requirement precludes review by the Kansas Supreme Court. *State* v. *Trams*, 189 Kan. 393, 369 P.2d 223.

The Kansas Supreme Court pointed out that defendant had failed to comply with this requirement in its opinion. *State* v. *Poulos*, 196 Kan. 253, 411 P.2d 694:

> "At the hearing on the motion for a new trial, the defendant did not offer Judge Kline's testimony as an individual, nor is the refusal to permit him to testify as an individual included in the notice of appeal or in the specification of error." p. 262.

The Kansas Supreme Court however did point out that to allow Judge Kline to testify would have been to compound error. The Court stated:

> ". . . In the first place, as pointed out by the district court, the statute (K.S.A. 62-1321) provides that the truth of the allegations of a petition for change of venue shall be tried by affidavits of the petitioner and counter affidavits of the state. The requirement does not contemplate statements of a judge in deciding a prior and wholly unrelated case to the one then pending before the court. In the second place, with one exception, all of the witnesses who testified before Judge Kline were present and testified in the instant case. Obviously, the fact of calling him could not have been to testify to matters which transpired at the former hearing. The witnesses were present and the opportunity was afforded to ask them any questions they were previously asked. In fact, the record discloses the same general questions were asked and answered. In the third place, and without passing upon the validity of Judge Kline's previous order which is not before us, it would have been impossible for the state to file counter affidavits in opposition to Judge Kline's state of mind, who made his decision based on facts within his own knowledge (State v. Taylor, 137 Kan. 280, 20 P.2d 628). The proof is to be made under the sanctity of an oath, not upon the opinion of unsworn persons who do not disclose the source of facts recited. As previously indicated, Judge Kline's conclusion was not based upon evidence presented before him, but was based upon his own knowledge.

> After the district court denied the proffer, counsel inquired if the court's ruling would be the same if Judge Kline were called as any other citizen to testify without referring to the previous case. The court stated:
>
> 'If there is any reason why this man cannot get a fair trial' in this court that exists today, there is nothing to stop you from putting on evidence as to what they are today, not what they were last October.'
>
> Counsel made no attempt to call Judge Kline as an individual citizen, but rested his case, offering no further testimony. . . ." *State* v. *Poulos*, 196 Kan. 253, 261, 411 P.2d 694 (Pet. App. 11-12).

Counsel for defendant had made quite clear his real purpose in calling Judge Kline to testify. The Kansas Supreme Court ferreted out this purpose by supplying the emphasis to the quotation taken from the record. *State* v. *Poulos*, 196 Kan. 253, 260 (Pet. App. 10-11).

Defendant had conceded that in the previous hearing in front of Judge Kline he had failed as a matter of law to prove the requisite elements for a change of venue and that Judge Kline had nevertheless changed the venue to another district on facts within his own knowledge (RR. 123).

The Kansas Supreme Court correctly held that this was improper and should not have been allowed. The Court further pointed out that defendant failed to preserve this on appeal (RR. 124).

In his petition defendant quotes part of the ruling in the trial court on refusing to allow Judge Kline's testimony (Pet. p. 9). The complete ruling must be viewed in the context of the situation confronting the court (Pet. App. 10-11). The trial court pointed out it was not precluding defendant from calling any witnesses, but was interested

in hearing evidence as to the climate of public opinion at the time of the hearing and not what it was a year earlier when Judge Kline had ruled. *State* v. *Poulos*, 196 Kan. 253, 261, 411 P.2d 694 (Pet. App. 12).

The basis of the rule that excluded testimony must be presented to the trial court at the hearing on the Motion for New Trial is founded in logic. To review the propriety of refusal to allow testimony, it is necessary for the reviewing court to know what that testimony would be. Failure to preserve this record precludes review as the court has nothing before it to review. Here the proffered testimony at best was a transcript of a year old hearing and failed to meet the requisite standards of the Kansas Supreme Court which are grounded in reason and sound policy while granting a fair opportunity to all parties to be heard. The defendant failed to comply with the requirements and should be precluded from having this Court review the matter.

3. Where Defendant Interjects His Past Criminal Activities As a Defensive Tactic Claiming Persecution in a Jury Trial, He Should Not Complain to This Court That the Jury Was Improperly Exposed to His Past Criminal Record.

This Court should recognize that defendant was tried three times. The first case was the Arson-Perjury case. There has never been a claim raised that the jury in that case was subjected to the situation existing in *United States* v. *Marshall*, 360 U.S. 310. In that case during the trial inadmissible evidence as to past criminal conduct of the defendant was printed in the newspaper during the trial. Some of the jurors in a special voir dire examination by the trial court admitted reading the articles. This Court ordered a new trial in its supervisory capacity over the lower Federal Courts.

In the instant case no such claim has heretofore been made. However, defendant states in his petition:

> "Here, as in *Marshall,* adverse publicity resulting in exposing the jury to the normally inadmissible facts relating to the petitioner's other alleged involvements in local crimes and arrests on charges similar to the current one." (Pet. p. 10).

This does not happen to be true and the record in this case shows quite clearly that such a statement had its conception and birth in the mind of the defendant but was stillborn as a fact. It should be noted that defendant did not even include the voir dire examination of any jury in the record prepared for the Kansas Supreme Court. It was necessary for the State to prepare such matter in its counter abstract in the Burglary-Larceny case (R. 53-61).

In the Arson-Perjury case, the Kansas Supreme Court pointed out:

> "The record does not show the court overruled any motion for a mistrial due to prejudicial conduct on the part of anyone. Nor does the defendant claim there was any misconduct on behalf of the jury, although one of the grounds of his motion for a new trial was that a member or members of the jury had been guilty of misconduct. That ground was abandoned by the defendant at the hearing of the motion for a new trial and it is not raised as a specification of error in this appeal." *State* v. *Poulos,* 196 Kan. 253, 258, 259, 411 P.2d 694 (Pet. App. 8).

Following his conviction in that case, defendant was tried to a jury on the Burglary-Larceny case. The jury was unable to agree and a mistrial granted and the case rescheduled for trial (R. 11-12). In the retrial the record shows that defendant took the stand and as part of his tactical defense claimed that he was being persecuted. He detailed for the jury the number of arrests he had had (R.

21). The State was then put in the rather odd position of attempting on cross-examination to show that the defendant was testifying that he was a bigger criminal than he really was. It was necessary for the State to show that he had been arrested fewer times than he actually testified to (R. 22). It was the defendant who introduced his prior criminal activities into the case. The difference in *Marshall* and this case is obvious. Normally inadmissible testimony was presented by the defendant as a tactic and he can't be heard to complain that outside factors caused this jury to know of his nefarious past. Defendant should not be allowed to interject the issue and then complain if the result is different than desired. He took a calculated risk and failed. The penalty for such a failure is just. To penalize the people of the State of Kansas for defendant's gamble would be unjust.

CONCLUSION

Petitioner has failed to establish a colorable question for review by this Court and it is submitted his Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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